

UNITED STATES OF AMERICA  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

Before Commissioners:

Michael Kubayanda, Chairman;  
Ann C. Fisher, Vice Chairman;  
Mark Acton;  
Ashley E. Poling; and  
Robert G. Taub

Competitive Product Prices  
Priority Mail & First-Class Package Service Contracts  
Priority Mail & First-Class Package Service Contract 200

Docket No. MC2021-115

Competitive Product Prices  
Priority Mail & First-Class Package Service Contract 200  
(MC2021-115)  
Negotiated Service Agreements

Docket No. CP2021-117

ORDER DENYING MOTION FOR ACCESS WITHOUT PREJUDICE AND  
HOLDING PROCEEDINGS IN ABEYANCE PENDING FILING OF JOINT STATEMENT

(Issued June 6, 2022)

I. INTRODUCTION

On May 12, 2022, the Strategic Organizing Center (SOC) filed a motion requesting access to certain non-public materials filed by the Postal Service as part of its request to add Priority Mail & First-Class Package Service Contract 200 to the competitive product list within the Mail Classification Schedule.<sup>1</sup> For the reasons

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<sup>1</sup> Strategic Organizing Center's Motion Requesting Access to Non-Public Materials Under Protective Conditions, May 12, 2022, at 1 (Motion).

discussed below, the Commission denies the Motion without prejudice to SOC refiling a request for access to non-public materials in the appropriate docket(s) at least 7 calendar days after filing of a joint statement by SOC and the Postal Service. The Commission holds Docket Nos. MC2021-115 and CP2021-117 in abeyance pending the filing of a joint statement by SOC and the Postal Service within 60 days of the date of issuance of this Order, after SOC's counsel meet and confer with the Postal Service's counsel in a good faith effort to narrow or resolve disputed issues and clarify the parties' positions on any issues they cannot resolve.

## II. PROCEDURAL HISTORY

On May 12, 2022, SOC filed a motion requesting access to the unredacted versions of the negotiated service agreement (NSA) currently in effect between the Postal Service and Amazon, and of the supporting Governor's Decision. Motion at 1. Upon information and belief, SOC identifies Shipping Services Priority Mail & First-Class Package Service Contract 200 (Contract 200), filed as Appendix B to the Postal Service's request that the Commission add the contract to the competitive product list in Docket No. CP2021-117,<sup>2</sup> as the relevant NSA. *Id.* SOC requests access to Contract 200 as well as the supporting Governor's Decision<sup>3</sup> for its counsel so that SOC may investigate and initiate a complaint before the Commission pursuant to 39 U.S.C. § 3662. *Id.* at 2.

On May 18, 2022, the Postal Service filed a response in opposition to the Motion and urges the Commission to deny the Motion with prejudice.<sup>4</sup> On May 19, 2022, the

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<sup>2</sup> USPS Request to Add Priority Mail & First-Class Package Service Contract 200 to Competitive Product List and Notice of Filing Materials Under Seal, July 21, 2021, Appendix B (Request).

<sup>3</sup> *Id.* Appendix A.

<sup>4</sup> Response of the United States Postal Service in Opposition to Motion for Access to Non-Public Materials, May 18, 2022, at 1, 4 (Postal Service Response).

Package Shippers Association (PSA) also filed a response in opposition, requesting that the Commission deny the Motion.<sup>5</sup>

### III. POSITIONS OF THE PARTIES

#### A. SOC Motion for Access

SOC requests access to unredacted versions of Contract 200 and the supporting Governor's Decision for its counsel for the purpose of "aiding the initiation of a proceeding before the Commission" pursuant to 39 C.F.R. § 3011.300(c). Motion at 1. Specifically, SOC seeks access to these documents so that its counsel may investigate and initiate a complaint before the Commission pursuant to 39 U.S.C. § 3662, in which it would allege that in its performance of Contract 200, the Postal Service is: (1) giving undue preference to the counterparty to the contract, in violation of 39 U.S.C. § 403(c); (2) causing delays to the delivery of equivalent service categories of "important letter mail," in violation of 39 U.S.C. § 101(e); and (3) is undermining "effective and regular postal services to rural areas," in violation of 39 U.S.C. § 101(b). *Id.* at 2.

SOC states it has preliminary evidence that the Postal Service prioritizes Amazon packages over every other kind of mail, that the Postal Service does not seek recourse for physical damage caused by Amazon deliveries to the Postal Service's facilities, and that Amazon may cancel its use of a particular post office without giving meaningful notice. *Id.* at 3-4. This suggests, according to SOC, that the Postal Service's NSA with Amazon likely includes terms that violate 39 U.S.C. §§ 101(b), 101(e), and 403(c). SOC therefore seeks access to the unredacted versions of Contract 200 and the supporting Governor's Decision to assess whether there are valid grounds for filing a complaint before the Commission. *Id.* at 4-5.

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<sup>5</sup> Response of the Package Shippers Association in Opposition to Motion for Access to Non-Public Materials, May 19, 2022, at 1-2 (PSA Response).

SOC states that it anticipates initiating a complaint proceeding before the Commission within 60 days of receiving access to the materials. *Id.* at 5. It further states that neither SOC as an organization nor its individual counsel have any affiliation with the delivery services, communications, or mailing industries, and neither SOC nor its individual counsel are involved in “competitive decision-making” within those industries. *Id.* The Motion includes SOC’s individual counsel’s signed protective conditions statement and certifications to comply with protective conditions. *Id.* Exhibit 1.

B. Postal Service Response

The Postal Service argues that SOC is attempting to circumvent well-established channels and safeguards for gaining access to non-public materials protected under 39 U.S.C. § 410(c)(2) and 5 U.S.C. § 552(b)(3)-(4), *i.e.*, either through the discovery process after filing a complaint or through filing a request under the Freedom of Information Act (FOIA). Postal Service Response at 1-2. Instead, the Postal Service argues, SOC is attempting to engage in some sort of pre-lawsuit discovery on “a fishing expedition” for potential collateral litigation. *Id.* at 2.

In addition, the Postal Service argues that granting the Motion would have a chilling effect on mailers’ willingness to contract with the Postal Service if any party could simply gain access to mailers’ confidential business information under the guise of gathering evidence to aid the initiation of a proceeding before the Commission. *Id.* at 2-3.

Furthermore, the Postal Service argues that the Commission should deny the Motion with prejudice to send a clear signal that 39 C.F.R. § 3011.301 is not a basis for parties with interests collateral to an immediate or pending proceeding to circumvent the procedures required by FOIA, discovery practice under the Commission’s regulations, or civil discovery practice under the Federal Rules of Civil Procedure. *Id.* at 3-4.

Finally, the Postal Service argues that none of the public or redacted terms in the materials at issue have any bearing on the service-related allegations in the Motion. *Id.* at 4. Specifically, the redacted content in Contract 200 includes the “name, address, signature block, and other information that could identify the customer[,] the negotiated price structure and the terms directly related to implementation of the price structure.” *Id.* (citing Request, Appendix F). The redacted content in the Governor’s Decision includes “the costs authorizing Domestic Competitive contracts[ ] and the analysis of those costs.” *Id.* The Postal Service argues that SOC thus fails to show how the materials sought are relevant to the proposed proceeding in accordance with 39 C.F.R. § 3011.301(b)(2)(ii).

#### C. PSA Response

PSA argues that granting the Motion would have a chilling effect on the willingness of package shippers to enter into future agreements with the Postal Service, and would jeopardize the Postal Service’s success in the competitive package delivery market. PSA Response at 1-2.

### IV. COMMISSION ANALYSIS

#### A. Legal Standard

The Postal Service may seek non-public treatment for materials that are submitted to the Commission if such information would be exempt from disclosure pursuant to 39 U.S.C. §§ 410(c), 504(g), 3652(f), or 3654(f).<sup>6</sup> Under 39 U.S.C. § 504(g)(3), the Commission has specific authority to determine whether production of

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<sup>6</sup> Non-Public Information, 83 Fed. Reg. 31,258, 31,282 (July 3, 2018) (to be codified at 39 C.F.R. § 3007.101(a)). These regulations went into effect on August 2, 2018. *Id.* at 31,258. The Commission’s regulations were later reorganized, and the rules pertaining to non-public material are now found at 39 C.F.R. part 3011. See Docket No. RM2019-13, Order Reorganizing Commission Regulations and Amending Rules of Practice, January 16, 2020 (Order No. 5407) (effective April 20, 2020).

the non-public material is required in the course of “any discovery procedure established in connection with a proceeding [before the Commission].” 39 U.S.C. § 504(g)(3)(B). Section 504(g)(3)(B) provides that, in the context of discovery, the Commission may disclose information obtained from the Postal Service if the disclosure is found to be appropriate and consistent with the kind of balancing of interest that is performed by federal civil courts when asked to establish protective conditions under Fed. R. Civ. P. 26(c). *Id.* Specifically, the statute requires the Commission to establish procedures by regulation based on Fed. R. Civ. P. 26(c) to ensure “appropriate confidentiality for information furnished to any party.” *Id.*

The Commission’s regulations governing access to non-public information codify this statutory requirement by setting forth rules providing for access to non-public materials along with strict protective conditions based on Fed. R. Civ. P. 26(c). In the rulemaking proceeding amending the rules relating to non-public information, the Commission provided an overview of how the rules function:

Recognizing that public disclosure of certain information may be commercially harmful to the Postal Service, other persons, or both, [the] existing [non-public materials rules] permit[] the filing of commercially sensitive information to be non-public (also known as ‘sealed’ or ‘under seal’). At the same time, acknowledging the need for transparency, [the] existing [non-public materials rules] provide[] for procedures to allow for a person to request that non-public materials be disclosed to the public (also known as ‘unsealed’). Moreover, [the] existing [non-public materials rules] provide[] for procedures to allow for persons to request access to non-public materials, subject to protective conditions, in order to meaningfully participate in Commission proceedings.<sup>7</sup>

The Motion concerns procedures relating to requests for access to non-public materials subject to protective conditions under subpart C of 39 C.F.R. part 3011. The parties do not dispute that the materials requested contain commercially sensitive

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<sup>7</sup> Docket No. RM2018-3, Notice of Proposed Rulemaking Relating to Non-Public Information, February 13, 2018, at 2 (Order No. 4403).

information and that the material is designated by the Postal Service as non-public. Subpart C of 39 C.F.R. part 3011 sets forth rules allowing access to non-public materials that “allow non-public materials to remain under seal and allow specific persons to access the materials subject to protective conditions.”<sup>8</sup>

As directed by 39 U.S.C. § 504(g)(3)(B), the rules in subpart C of 39 C.F.R. part 3011 state that “[i]n determining whether to grant access to non-public materials, the Commission shall balance the interests of the parties consistent with the analysis undertaken by a Federal court when applying the protective conditions appearing in Federal Rule of Civil Procedure 26(c).” 39 C.F.R. § 3011.301(e). Fed. R. Civ. P. 26(c) provides that a:

Court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, [upon a motion from] [a] party or any person from whom discovery is sought...[coupled with] a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action.

Fed. R. Civ. P. 26(c)(1).

The party opposing access to non-public information, analogous to requesting a protective order under Fed. R. Civ. P. 26(c), “bears the burden of making the showing of good cause contemplated by the rule and therefore must make a specific demonstration of facts in support of the request[.]”<sup>9</sup> Courts reviewing a request for a protective order “must weigh the movant’s proffer of harm against the adversary’s significant interest in preparing for trial.” *Smith*, 322 F.R.D. at 99 (internal citations and marks omitted). When determining whether to limit or deny discovery under this rule, the United States

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<sup>8</sup> Docket No. RM2018-3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, at 65 (Order No. 4679).

<sup>9</sup> *Smith v. Yeager*, 322 F.R.D. 96, 99 (D.D.C. 2017) (internal citations and marks omitted).

Court of Appeals for the District of Columbia Circuit balances several factors including “the requester’s need for the information from this particular source, its relevance to the litigation at hand, the burden of producing the sought-after material[,] and the harm which disclosure would cause to the party seeking to protect the information.”<sup>10</sup> Other federal courts consider additional factors such as whether the party benefiting from a protective order is a public entity or official, and whether the information relates to issues important to the public.<sup>11</sup>

Accordingly, the Commission’s rules permitting access to non-public materials set forth strict conditions that must be met prior to the disclosure of any information. Section 3011.301 requires that a motion requesting access to non-public materials shall “[i]dentify the particular non-public materials to which the movant seeks access” and “[i]nclude a detailed statement justifying the request for access[.]” 39 C.F.R. § 3011.301(b)(1) and (2). Additionally, “[i]f access is sought to aid initiation of a proceeding before the Commission, the motion shall describe the subject of the proposed proceeding, how the materials sought are relevant to that proposed proceeding, and when the movant anticipates initiating the proposed proceeding[.]” *Id.* § 3011.301(b)(2)(ii). The motion must “[a]ttach a description of protective conditions completed and signed by the movant’s attorney or non-attorney representative,” and it must “[a]ttach a certification to comply with protective conditions executed by each person (and any individual working on behalf of that person) seeking access[.]” *Id.* § 3011.301(b)(5) and (6). Furthermore, for individuals to be eligible for access, they must

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<sup>10</sup> *Burka v. U.S. Dep’t of Health & Human Servs.*, 87 F.3d 508, 517 (D.C. Cir. 1996) (internal citations omitted). Here, because the Postal Service has already provided the requested material at issue, the burden of producing the requested material is not a factor in the Commission’s analysis.

<sup>11</sup> See *Castellani v. Atl. City*, 102 F. Supp. 3d 657, 666 (D.N.J. 2015).



not be involved in “competitive decision-making for any individual or entity that might gain competitive advantage from using non-public materials[.]”<sup>12</sup>

## B. Analysis

Before the Commission evaluates the merits of the Motion, the Postal Service Response, the PSA Response, and engages in a balancing-of-interests analysis, there is a threshold and fundamental issue with respect to the Motion. Upon reviewing the unredacted versions of Contract 200 and the supporting Governor’s Decision at issue, the Commission determines that these materials have no relevance to the allegations SOC anticipates it would make in the proposed proceeding before the Commission. Specifically, the Motion contains allegations that the Postal Service gives undue preference to Amazon, that this causes delays to the delivery of equivalent service categories of letter mail, and that this undermines effective and regular postal services to rural areas. Motion at 2. However, Contract 200 and the supporting Governor’s Decision do not appear connected to these allegations. Therefore, SOC has failed to satisfy the requirement of 39 C.F.R. § 3011.301(b)(2)(ii), and it appears that the Motion should be denied.

However, considerations discussed in the Commission’s 2018 rulemaking process, during which § 3011.301(b)(2)(ii) was added, militate against denying the Motion with prejudice, as requested by the Postal Service. Section 3011.301(b)(2)(ii) was added when the Commission expanded the scope of 39 C.F.R. § 3011.300(c) in 2018 to allow a person to seek access for the purpose of aiding the initiation of a

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<sup>12</sup> *Id.* § 3011.300(b). An individual is involved in “competitive decision-making” if he or she “consult[s] on marketing or advertising strategies, pricing, product research and development, product design, or the competitive structuring and composition of bids, offers or proposals. It does not include rendering legal advice or performing other services that are not directly in furtherance of activities in competition with an individual or entity having a proprietary interest in the protected material.” *Id.*

proceeding before the Commission.<sup>13</sup> Section 3011.301(b)(2)(ii) was intended to “provide additional guidance to movants regarding the justification required” when the movants seek to use non-public materials to aid initiation of a proceeding before the Commission. Order No. 4403 at 24.

In its order adopting final rules relating to non-public information, the Commission declined to adopt the Postal Service’s suggestion to delete the provisions in proposed §§ 3011.300(c) and 3011.301(b)(2)(ii) that would permit persons to seek access to non-public materials solely for the purpose of aiding the initiation of a proceeding before the Commission. Order No. 4679 at 27. The Commission considered and rejected three objections raised by the Postal Service. In response to the Postal Service’s objection that the proposed rules allow persons to obtain access by providing only limited justification relating to a vague, undeveloped proposal to initiate a proceeding, the Commission explained that the requirements contained in § 3011.301(b)(2)(ii) “ensure that the request for access is made in good faith, but are not so strict as to require that the planned proceeding is fully ready.” *Id.* at 28. In addition, § 3011.301(c) permits the filing of a response to a motion for access. Therefore, the Commission concluded that there are sufficient procedural mechanisms to ensure that the justification given by the movant is adequate. *Id.*

The Commission also rejected the Postal Service’s concern with regard to misuse, dissemination, or lack of care of the materials after the movant is granted

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<sup>13</sup> See Order No. 4403 at 22. That order referred to various proposed sections in 39 C.F.R. part 3007. As discussed previously, the Commission’s regulations pertaining to non-public materials were later reorganized from 39 C.F.R. part 3007 to part 3011. See *supra* n.6. Therefore, the Commission refers to present regulations appearing in part 3011 throughout this Order. The Postal Service’s references to the Commission’s 2014 denial of a request for access are inapplicable considering the express expansion of the scope of the Commission’s rules in 2018 to allow a person to seek access for the purpose of aiding the initiation of a proceeding before the Commission. See Postal Service Response at 2 (citing Docket Nos. MC2014-1 and CP2014-1, Order Denying Motion Requesting Access to Non-Public Materials, February 7, 2014, at 7 (Order No. 1985) (denying as premature a motion for access seeking non-public pricing information and estimated volumes and costs to determine compliance of the NSA at issue because the motion was filed before the filing of the applicable Annual Compliance Report)).

access but does not ultimately initiate a proceeding. *See id.* The Commission emphasized that persons who obtain access are subject to protective conditions, which limit use and dissemination of the non-public materials; they are also subject to sanctions under § 3011.303(a) for violation of protective conditions; and § 3011.303(b) reserves the right of any person, including the Postal Service, to pursue other remedies. *See id.*

Finally, in response to the Postal Service's contention that there are already indirect procedural mechanisms to aid persons to initiate a proceeding before the Commission, which undermined the necessity of the proposed rule, the Commission stated that final §§ 3011.300(c) and 3011.301(b)(2)(ii) provide a direct mechanism, which "makes the rules plain and more accessible to the public[.]" and "facilitates the design and enforcement of protective conditions that will ensure the non-public material, and the non-public information contained therein, are used only for the purposes supplied." *Id.* at 28-29.

In light of the regulatory history of §§ 3011.300(c) and 3011.301(b)(2)(ii), the goal of making these rules "more accessible to the public,"<sup>14</sup> and the fact that the instant Motion appears to be the first instance in which the movant seeks access to non-public information for the purpose of aiding initiation of a proceeding before the Commission since the final rules went into effect in 2018, the Commission determines that it is in the public interest to allow the public (here, SOC) meaningful opportunities under §§ 3011.300(c) and 3011.301(b)(2)(ii) to gain access to non-public information to aid initiation of a proceeding before the Commission. This is also in furtherance of the Commission's overall goal of providing accountability, transparency, and oversight of the Postal Service. At the same time, however, the Commission cannot grant a motion that fails to satisfy the relevance requirement under § 3011.301(b)(2)(ii), given the lack of an apparent connection between Contract 200 and the Motion's allegations.

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<sup>14</sup> *Id.* at 29.

Therefore, the Motion is denied without prejudice to SOC refiling a request for access to non-public materials in the appropriate docket(s) at least 7 calendar days after filing of a joint statement by SOC and the Postal Service.

Counsel for SOC and the Postal Service shall file a joint statement within 60 days of the date of issuance of this Order. Prior to filing the joint statement, SOC's counsel shall meet and confer with the Postal Service's counsel. The Commission's rules provide a pathway to encourage parties to make good faith efforts to resolve access motions. See 39 C.F.R. § 3011.301(b)(4). Moreover, 39 C.F.R. § 3022.10(a)(9) requires a complainant to attempt to meet and confer with the Postal Service's General Counsel to resolve or settle the complaint prior to filing the complaint. Similarly, the Commission finds that it is beneficial for parties to meet and confer before SOC decides to refile any motion for access to non-public materials, so that the parties may have an opportunity to narrow or resolve disputed issues or at least clarify their positions on any issues they cannot resolve, and the Commission may issue an order on any refiled motion in an efficient manner. In conjunction with its most recent Annual Compliance Report filing, the Postal Service has publicly identified the attorney responsible for notifying the Postal Service's domestic NSA customers of motions related to the NSA customer's non-public information.<sup>15</sup> Understanding that counsel have obligations to their clients, the Commission expects that counsel shall make a good faith effort to narrow or resolve disputed issues and clarify the positions of the parties on any issues they cannot resolve relating to access to the non-public materials. Parties shall address the following matters in their joint statement:

1. Potential identification of the docket or contract number(s) applicable to NSAs between the Postal Service and Amazon;

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<sup>15</sup> Docket No. ACR2021, United States Postal Service *Annual Compliance Report*, Attachment 2, Appendix 1, December 29, 2021, at 2.

2. Potential provision of the unredacted text of the applicable contract(s) between the Postal Service and Amazon and the supporting Governor's Decision(s);
3. Potential narrowing of the scope of non-public materials sought by SOC;
4. Potential terms for a non-disclosure agreement governing SOC's counsel's use, care, and dissemination of any non-public information and materials; and
5. Any other potential matter that would aid in an efficient resolution of the request for access to the non-public materials.

The Commission determines to hold Docket Nos. MC2021-115 and CP2021-117 in abeyance, pending the filing of a joint statement by SOC and the Postal Service.

#### V. CONCLUSION

For the above reasons, the Commission denies the Motion without prejudice to SOC refiling a request for access to non-public materials in the appropriate docket(s) at least 1 week after filing of a joint statement. The Commission holds Docket Nos. MC2021-115 and CP2021-117 in abeyance, pending the filing of a joint statement by SOC and the Postal Service within 60 days of the date of issuance of this Order. Prior to filing the joint statement, counsel for both parties shall make a good faith effort to meet and confer to narrow or resolve disputed issues and clarify the positions of the parties on any issues they cannot resolve relating to access to the non-public materials.

## VI. ORDERING PARAGRAPHS

*It is ordered:*

1. The Strategic Organizing Center's Motion Requesting Access to Non-Public Materials Under Protective Conditions, filed May 12, 2022, is denied without prejudice to SOC refiling a request for access to non-public materials in the appropriate docket(s) at least seven calendar days after filing of a joint statement.
2. Docket Nos. MC2021-115 and CP2021-117 are held in abeyance, pending the filing of a joint statement by SOC and the Postal Service within 60 days of the date of issuance of this Order.
3. Prior to filing the joint statement, SOC's counsel shall meet and confer with the Postal Service's counsel. Understanding that counsel have obligations to their clients, the Commission expects that counsel for both parties shall make a good faith effort to narrow or resolve disputed issues and clarify the positions of the parties on any issues they cannot resolve relating to access to the non-public materials.
4. Parties shall address the following matters in their joint statement:
  - a. Potential identification of the docket or contract number(s) applicable to NSAs between the Postal Service and Amazon;
  - b. Potential provision of the unredacted text of the applicable contract(s) between the Postal Service and Amazon and the supporting Governor's Decision(s);
  - c. Potential narrowing of the scope of non-public materials sought by SOC;

- d. Potential terms for a non-disclosure agreement governing SOC's counsel's use, care, and dissemination of any non-public information and materials; and
- e. Any other potential matter that would aid in an efficient resolution of the request for access to the non-public materials.

By the Commission.

Erica A. Barker  
Secretary